No. 95-689 (2)

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1995

VINCENT FIORETTI,

Petitioner,

vs.

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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35 pp

QUESTIONS PRESENTED

1. Whether the filing of a late motion for reargument extends the time to file a Petition for Certiorari.

2. Whether new issues may be raised for the first time in a Petition for Certiorari.

3. Whether any federal issue is presented in a case involving New Jersey law as to the extension of a two-year deadline to contest the fraud of an applicant for life insurance.

4. Whether concepts of due process, privileges and immunities or equal protection of the law within the meaning of the Fourteenth Amendment prohibit a court from rescinding a life insurance policy procured through fraud.

5. Whether the Individuals with Disabilities Act (42 U.S.C. § 12101) regulates insurers.

6. Whether that Act protects cheats who send an impostor to take a blood test and who deceive insurers into issuing life insurance policies.

ALL PARTIES TO THE PROCEEDING

The listing in the Petition for Certiorari is accurate.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida is not reported. It is printed in the Appendix to the Petition for Certiorari at pp. 23a-51a.

The opinion of the Court of Appeals is found at 53 F.3d 1228 (11th Cir. 1995) and is printed in the Petition for Certiorari at pp. 3a-22a.

STATEMENT OF THE CASE

A. The Facts

Anthony C. Fioretti was dying due to the human immuno deficiency virus (Exhibit 61, Siegal Dep. 34-3; Exhibit 60, Dr. Kaminsky Dep. 22-23), when he applied to Massachusetts General Life Insurance Company for a policy bearing a face amount of $1,947,111. Stip. 1, 5-1[illegible]. Fioretti listed his name on the application as "C. Tony Fioretti" and gave a phony birthday. Exhibit 12. He thereby hoped to defeat the Medical Information Bureau, which accumulates data on insureds and prospective insureds and which discloses health information to underwriters at member insurers.

After the insurer asked for a blood test, Fioretti sent Monroe Tinker to submit to that test at a walk-in clinic in the Soho District of Manhattan. Steinhart Dep. 5-9. Posing as Fioretti, Tinker submitted his blood which was mailed to the testing lab. Tinker's blood was "clean," so the testing laboratory reported that the submitted blood was negative for the HIV antibody. Trial Tr. 1-128-129; Roberts Dep. 47-48.

While the application was pending, Fioretti consulted two doctors about his HIV-AIDS. Dr. Barnett Dep. 18-24; Dr. Laubenstein Dep. 25-26, 33.

In September, 1987, the underwriter at Massachusetts General approved the application for insurance, intending to insure the man who submitted his blood for testing. Trial Tr. 1-139. The approval was conditional, however. The applicant had to sign a Statement of Good Health and Insurability prior to delivery of the policy. Trial Tr. 1-130-131. Policy 10 L 0880600 was mailed to the Manhattan brokers for delivery to Fioretti with instructions to obtain a signed Statement of Good Health from Fioretti. Tr. Tr. 1-130-131, Exhibit 26. Fioretti signed that document on September 25, 1987 and falsely asserted that:

1. he continued to be in good health since last exam for insurance; and

2. he had not consulted a physician since that exam.

Exh. 26.

That Statement of Good Health and Insurability, like the application which preceded it, was said to have been signed in "Newark, New Jersey." Exh. 26. That was an important fact to Massachusetts General, because it was not licensed to do business in New York.

Policy 10L0880600 was predated and bore "the date of issue" as August 30, 1986, six months before Fioretti first applied for that policy. Exhibit 27 at p.3.

Fioretti died of AIDS on February 28, 1989, (Exhibit 39, Stip. 5-27) just 17 months after the delivery of the policy but more than 2 years from "the date of issue," shown on the policy.

B. Lack of Facts Concerning a Major Issue

In an attempt to create a "certworthy" case, the petitioner has exaggerated the importance of the decisions below as to the

stability of insurance policies. His claimed dire consequences are not supported by the facts or the record in this case. Pet. Cert. at pp. 6-7 . No calamity exists for insureds for many reasons.

First, the impostor doctrine holds that insurers insure lives, not names (*Ludwinska v. John Hancock Mutual Life Insurance Co.*, 317 Pa. 577, 178 A.28, 98 A.L.R. 705 (Sup. Ct. 1935)) so insurers may refuse to pay a death benefit, even though the two-year deadline has elapsed. That doctrine has been around since the decision in *Maslin v. Columbian Mutual Life Insurance Co.*, 3 F. Supp. 368 (S.D.N.Y. 1932). *See* the discussion below at pp. 7-8.

Since then, insurers have paid millions of life insurance claims without a contest. The impostor doctrine presents no threat to anyone except those who use an impostor for the medical examination or blood test. That is a very small group, judging by the few decisions involving impostors.

Secondly, extending or contracting a deadline for suit is a minor matter, unregulated by any constitutional law doctrine. *See* Point III below.

Third, the decision does not have a nationwide impact, because only New Jersey law was involved.

Fourth, this was not a class action.

SUMMARY OF ARGUMENT

The Petition for Certiorari is untimely and raises arguments, which were not urged below.

The Petition presents no federal or constitutional question.

Insurers insure lives, not names. If any insurance was validly issued, it was on the life of the impostor. He is not dead.

All jurisdictions recognize that the contestability clause does not bar voiding a policy where an impostor was used to obtain the policy.

The Disabilities Act:

A. does not regulate insurers;

B. does not regulate insurance; and

C. does not require insurers to accept improvident risks.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR CERTIORARI IS UNTIMELY DUE TO THE LATE MOTION FOR A REHEARING.

The judgment of the Court of Appeals was entered on June 7, 1995. Resp. App. 3a, 9a. Under F.R.A. P. 40(a), a party must file his Petition for Rehearing "within 14 days after the entry of judgment. . . ." Because the judgment of the Court of Appeals was entered on June 7, 1995 (Resp. App. 3a, 9a), 14 days later was June 22, a Wednesday. The Petition for Rehearing was not mailed for filing until June 23, 1995. Resp. App. 10a. On that day it was at least one day late. If June 26, 1995, the true filing date of that Petition, (Resp. App. 3a) controls, the petition for rehearing was four days late. Rule 13.4 of the United States Supreme Court provides that ". . . if a petition for rehearing is *timely* filed in the lower court by any party in the case, the time for filing the petition

for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing . . . ." (Emphasis supplied).

Because the Petition for Rehearing was late, it did not extend the time for the filing of a Petition for Certiorari. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 210-211, 73 S. Ct. 245, 248, 97 L. Ed. 245 (1952). It should be dismissed.

II.

THE PETITION PRESENTS ISSUES NOT RAISED BELOW SO THIS COURT SHOULD DISMISS THE PETITION.

A second ground for dismissal of this case is that the proffered issues were never raised below. Resp. App. 10a-11a. Hence, they cannot be raised for the first time in this Court. *White River Lumber Co. v. Arkansas on rel. Applegate*, 279 U.S. 692, 700, 49 S. Ct. 457, 73 L. Ed. 903 (1929) (equal protection argument as to taxation of corporations not raised below); *Cleveland & Pittsburgh Railroad v. Cleveland*, 235 U.S. 50, 35 S. Ct. 21, 59 L. Ed. 27 (1914) (effect of legislation subsequent to the contract not raised below); *Hiawassee River Power Co. v. Carolina-Tennessee Power*, 252 U.S. 341, 344, 40 S. Ct. 333, 331, 67 L. Ed. 601 (1920). The Petition for Certiorari should be dismissed or denied on that ground as well.

III.

THE DEFICIENT PETITION PRESENTS NO CONSTITUTIONAL OR FEDERAL ISSUE.

A. The Petition Presents No Constitutional Issue.

Although the Petition for Certiorari in this case quotes the

Fourteenth Amendment, it does not specify how a rescission of an insurance contract due to fraud violates any term of the Fourteenth Amendment. *See* Petition for Certiorari at pp. 6-8. This deficiency warrants the denial of the petition. Supreme Court Rule 14.1(j); *Travelers Health Assn' v. Virginia*, 339 U.S. 643, 651, 70 S. Ct. 927, 931, 94 L. Ed 1154 (1950) (points not argued are not considered).

We submit that the reason for this deficiency is that no constitutional question can be presented. This Petition is frivolous.

At the risk of beating a dead horse, we point out in the next subsections that none of the phrases in the Fourteenth Amendment afford relief to the cheat or his beneficiary who wishes to exploit the fraud of the insured.

B. No Constitutional Claim Is Involved When a Duped Insurer Rescinds a Policy.

Even if this Court were to ignore the failure to present any constitutional argument below, it cannot find a basis for such an argument in the case at bar. For several reasons, such arguments would be frivolous.

1. Due Process of Law Is Not Involved.

a. No Procedural Due Process Argument Can Be Made.

The due process argument, if made, fails for several reasons. First "due process" doctrines control mostly governmental procedure or the absence of a procedure. In this case, the beneficiary had the right to litigate the refusal to pay the death benefit and he amply and fully exercised that right under the Federal Rules of Civil Procedure.

Second, periods of limitation "are by definition arbitrary" and are subject to a high degree of control and interpretation by the courts. *Cf. Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S. Ct. 1137, 1142, 89 L. Ed. 1628 (1945). Extending the time to sue presents no due process issue.

Third, insurers uniformly sue to rescind life insurance policies when they have been defrauded. *Ledley v. William Penn Life Insurance Co.*, 138 N.J. 627, 651 A.2d 92 (1995); *Paul Revere Life Insurance Co. v. Haas*, 137 N.J. 190, 644 A.2d 1098 (1994). They file such suits when the applicant lies about his health, his occupation, his job, his not smoking and so on. No invidious discrimination exists in such suits. No court has held that such suits violate due process doctrines or any other constitutional doctrine. Indeed, the opposite is true: if a victim of fraud could not sue to rescind or for damages, significant due process issues would be present.

Fourth, the due process clause does not mandate economic foolishness and certainly does not mandate favorable treatment of frauds. Insurance depends on the acceptance of risk which is undetermined at the time the policy is delivered. *Cf.* Keaton Widiss, *Insurance Law* §§ 1.3 and 1.4 (West Pub. 1988). No insurer can survive if the risk is known to be great or certain to the applicant. The man who sees his building burning ought not and cannot obtain new fire insurance at that point. Similarly, AIDS causes rapid death. The life insurance system cannot survive if life insurers must take on such individuals with a very limited life expectancy.

Fifth, Fioretti claims the right to insurance proceeds after the elapse of two years from "the date of issue," so he is making a breach of contract argument, not a constitutional argument. No court has stripped him of that alleged right without a fair hearing. Every court, confronted with a true impostor case, holds that no

insurance exists, or if it exists, the insurance is on the life of the impostor. The contestability deadline is no bar to rescission. *See Maslin v. Columbian National Life Insurance Co.*, 3 F. Supp. 368 (S.D.N.Y. 1932) (the seminal case); *Obartuch v. Security Mutual Life Insurance Co.*, 114 F.2d 873 (7th Cir. 1940), *cert. denied*, 312 U.S. 696, 61 S. Ct. 370, 85 L. Ed. 1131 (1941); *Strawbridge v. New York Life Insurance Co.*, 504 F. Supp. 824 (D.N.J. 1980); *Ludwinksa v. John Hancock Mutual Life Insurance Co.*, 317 Pa. 577, 178 A.28, 98 A.L.R. 705 (Sup. Ct. 1935); *Petaccio v. New York Life Insurance Co.*, 125 Pa. Super 15, 189 A. 697 (Super. Ct. 1937); *cf. Unity Mutual Life Insurance Co. v. Moses*, 621 F. Supp. 13 (E.D. Pa.), *affirmed without opinion*, 780 F.2d 1017 (3d Cir. 1985).[1] Millions of life insurance claims have been paid since the decision in *Maslin*. The impostor doctrine is not a threat to honest policyholders or to dishonest insureds who lie about their health and who live two years after the delivery of the policy.

Sixth, for over 80 years, courts or legislatures have carved out many exceptions to the contestability deadlines. *See, e.g., Guarantee Trust Life Insurance Co. v. Wood*, 631 F. Supp. 15 (N.D. Ga. 1984) (forgery of insured's signature); *Spear v. Guardian Life Insurance Co.*, 112 App. Div. 2d 904, 493 N.Y. Supp. 2d 322 (1st Dept. 1985) (fraud during the claim period); *Protective Life Assurance Co. v. Linson*, 245 Ala. 493, 17 S.2d 761 (Sup. Ct. 1944) (murder by beneficiary); *Beard v. American Agency Life Insurance Co.*, 314 Md. 235, 550 A. 2d 677, 689 (Ct. App. 1988) (lack of insurable interest); *contra New England Mutual Life Insurance Co. v. Caruso*, 73 N.Y. 2d 74, 535 N.E. 2d 270, 538 N.Y. Supp. 2d. 217 (Ct. App. 1989). Those exceptions do not violate due process. Rather they are the result of deliberate

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1. Although *Bankers Security Life Insurance Society v. Kane*, 885 F.2d 820 (11th Cir. 1989) said in dictum that Florida would not follow the impostor doctrine, it cited no Florida case in point and failed to realize that a Florida District Court of Appeals had cited an impostor case with approval. *See Cook v. Life Insurance Company of North America*, 386 S.2d 310, 313 (Fla. Dist. Ct. App. 1980).

and due process which leads to reasoned decisions after notice to all affected parties.

b. No Substantive Due Process Argument Can Be Made.

Substantive due process affects limited areas, where the government may not tread, no matter how fair the procedures used to achieve result. *Planned Parenthood v. Casey*, __ U.S. __, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Those areas of liberties are limited to invasions of privacy or to some rights protected by the Bill of Rights. *Id.* No invasion of privacy or liberty occurred in this case. Only in the world of sloppy thinking could someone urge that a miscreant or his innocent beneficiary has a due process right to an iron-clad deadline to protect his hoped-for theft from an insurer. The Petition argues at p. 6 that Fioretti and brother, the beneficiary and appellant, did not aid in the fraudulent placement of the life insurance so that distinguishes the impostor cases. Even if that is a difference, the difference is inconsequential morally and legally. The brother of the insured wishes to exploit the gross fraud of his brother. That does not make him a sympathic figure. The innocence of the beneficiary is irrelevant as to whether the insured lied to get the policy and such innocence is never a bar to the rescission of a policy. Furthermore, that argument is just a claimed refinement of state law and not a constitutional claim.

2. No Privilege Is Involved.

No one has suggested that the hoaxers in those cases have some "privilege" to cheat protected by the Fourteenth Amendment. *Cf. Zobel v. Williams*, 457 U.S. 55, 74-77, 72 S. Ct. 2309, 72 L. Ed. 2d 672 (1982) (concurring opinion of O'Connor J. noting that the privilege clause prohibits discrimination against non-residents who enter another state); *Twining v. New Jersey*, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908) (listing various

rights protected from state encroachment; the right to enforce an insurance contract is not one of them)[2]; *see also,* Tribe, *American Constitutional Law* § 7-4 at notes 19-23, p. 558 (2d. ed. Foundation Press 1988) (concluding that the privilege and immunities clause "appears technically redundant so far"). The beneficiary sued in his home state. The courts below did not discriminate for or against him.

3. Equal Protection Doctrines Are Not Involved.

A law passes the requirements of equal protection of the law if the legislation has a "fair relationship to a legitimate public purpose." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). Although the judiciary may run afoul of the Equal Protection Doctrine when it excludes a racial class from a jury (*Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 2d 866 (1954)), it surely cannot violate that clause when it makes a careful decision that a cheat or his beneficiary does not get money from an insurer (or any victim of chicanery), so long as such a holding is not racially based. Absolutely no suggestion exists in the record that the opinion of the lower court was based on Fioretti's race. The Equal Protection Clause has no relevance to this case.

If the equal protection argument is that many miscreants are absolved by the two-year deadline, so Fioretti should be similarly absolved, that argument fails, because:

1. The impostor rule is a rational solution to the chicanery of a grossly dishonest man;

2. Limitation periods are not fundamental rights, so

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2. *Twining* has been overruled on other grounds. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

deadlines may be extended, *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 102 S. Ct. 1137, 1141, 71 L. Ed. 2d 250 (1982); *Chase Securities Corp. v. Donaldson, supra;*

3. The insurer, not the cheat, needs the "protection" of the Equal Protection Clause; and

4. Courts should not be the helpers of frauds.

IV.

THE EQUAL OPPORTUNITY ACT DOES NOT REGULATE INSURERS.

The Equal Opportunity for Individuals with Disabilities Act, 42 U.S.C.§ 12101 *et seq.*, has no relevance to this case for several reasons. First, that act controls only "an employer, employment agency, labor organization or joint labor-management committee." 42 U.S.C. § 12111 (2). It does not regulate insurers.

Second, that act does not purport to regulate insurance. No case has held that insurance coverage, offered by an employer, must be provided to unhealthy employees, because such insurance policies are "terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). *See McGann v. H. & H. Music*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, __ U.S. __, 113 S. Ct. 482, 121 L. Ed. 2d 387 (1992). The reasons for not obligating the employer to do such an impossible thing are obvious:

- it is the insurer, not the employer, who decides whether to issue coverage; and

- insurers underwrite random risks, not certain losses.

Third, the McCarran-Ferguson Act has left to the states the regulation of insurance. 15 U.S.C. § 1011 *et seq.* This Court presumes that Congress did not intend to preempt areas of traditional state regulation. *FMC Corp v. Holliday*, 498 U.S. 52, 62, 111 S. Ct. 403, 410 112 L. Ed. 2d 356 (1990). Even the Employees' Retirement Income Security Act (29 U.S.C. § 1001 *et seq.*) which controls many pension and benefit plans, does not regulate insurance policies issued with respect to such plans. Those policies are controlled by state law. *FMC Corp. v. Holliday, supra.*

Finally, no federal statute should be given a bizarre interpretation, which leads to absurd conclusions. *United States v. Bryan*, 339 U.S. 323, 338, 70 S. Ct. 724, 734, 94 L. Ed. 884 (1950).

Requiring life insurers to accept seriously ill persons as insureds would ruin them or force them to sell policies with such high premiums that no one would buy them.

V.

THE PETITION IS FRIVOLOUS SO THIS COURT SHOULD AWARD DAMAGES AND DOUBLE COSTS.

The Petition for Certiorari is "frivolous" within the meaning of Supreme Court Rule 42.2.[3] This Court should award damages and double costs.

In preparing this brief, this author has spent at least 34 hours in legal research and in drafting this brief. The hourly charge to

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3. Rule 42.2 provides in relevant part: "When a petition for a writ of certiorari . . . is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43."

Massachusetts General for those activities is at the rate of $200 per hour. Hence, this Court should award $6,800 to the respondent. In addition, it should award double the printing costs of at least $1,350.

CONCLUSION

This Court should deny the Petition for Certiorari and should award damages of $6,800 plus double costs of $2,700 ($1,350 x 2).

Respectfully submitted,

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APPENDIX A — DOCKET ENTRIES

ATTY CODE: *N* DATE DOCKETED: *11/3/93*

DKT # 93-5187

* * *

VINCENT FIORETTI,

Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,

versus

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY,

Defendant-Counter-Claimant-Appellee-Cross-Appellant.

CLOSED *8/4/95* @

APPEARANCE FILED DATE	Br	ATTORNEY(S) FOR APPELLANT(S)	ARG P
12/15/93	*x*	*GERALD LESHER* *1555 Palm Beach Lakes Blvd* *West Palm Beach, FL 33401* *(407) 772-3206*	*x*

Appendix A

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APPEARANCE FILED DATE	Br	ATTORNEY(S) FOR APPELLEE(S)	ARG P
12/16/93	x	*JOHN W. THORNTON* *Ste 720, 19 West Flagler Street* *Miami, FL 33430-4978* *(305) 668-0100*	
3/8/95	x	*MARK F. HUGHES, JR.* *Robinson, St. John & Wayne* *Two Penn Plaza East* *Newark, NJ 07105* *(201) 491-3300*	x

7. CALENDAR INFORMATION
1/11/95 Argument Scheduled for *3/8/95* in *MIAMI*

* * *

Argument Panel: *PAK/JLE/EISELE*
3/8/95 Case Argued — By Apt *XX* By Ape *XX*

* * *

Courtroom Deputy: *J. Richardson*

Appendix A

8. OPINION INFORMATION - Pub *xxx*
6/7/95 Opinion Issued

* * *

EISELE Signed

* * *

☒ *VACATED & REMANDED*

9. JUDGMENT AND MANDATE INFORMATION

* * *

6/7/95 Judgment Entered

* * *

8/4/95em Judgment & Opinion Issued to Clerk as Mandate

* * *

8/22/95em Record on Appeal Returned to Clerk (*9* Vols.)
8/22/95em Exhibits Returned to Clerk (Itemize) *1 folder, 1 box*

* * *

10. REHEARING INFORMATION
06/26/95 Petition for Rehearing *(J) 6/28-95*

Apt *X* Panel *X*

Appendix A

* * *

7/24/95 Order Denying Rehearing

* * *

DATE NOTATIONS REGARDING COMMUNICATIONS WITH PARTIES OR COUNSEL

12/8/93 *DKT-1 to all parties. jwf*
10/12/94 *MOT-2 sent to all parites on DENIAL of Appellant's Suggestion of Hearing EN Banc. jw*

1. MISCELLANEOUS FILINGS

* * *

11/12/93 *Civil* Appellate Docketing Statement *VF*
11/22/93 *Civil* Appellate Docketing Statement *MGLIC*

* * *

2. JURISDICTIONAL SCREENING
FILINGS/ACTIONS
11/18/93 Staff Atty. Jurisdiction *VF*
11/18/93 Staff Atty. Jurisdiction *MGLIC*

* * *

11/29/93 Probable Jurisdiction Noted *Both VF & MGLIC*

* * *

Appendix A

3. RECORD & EXHIBITS

FILED		DUE
11/5/93	Appeal Info. Sheet *VF* Sgn. Dt. *11/4/93*	*11/4/93*
11/22/93	Appeal Info. Sheet *MGLIC* Sgn. Dt. *11/19/93*	*11/4/93*

* * *

11/30/93	Ct. Rptr. Ack. *VF* Fin/Arr. Y	*11/18/93*
11/30/93	Ct. Rptr. Ack. *MGLIC* Fin/Arr. Y	

* * *

11/30/93	Ct. Rptr. Fin. *VF (Fin. Arr. cmpltd 11/16/93)*	
11/30/93	Ct. Rptr. Fin. *MGLIC (Fin. Arr. cmpltd 11/16/93)*	

* * *

12/6/93	Transcript *VF*	*12/28/93*
12/6/93	Transcript *MGLIC*	*12/28/93*

* * *

1/28/94	Certificate of Readiness	*1/21/94*
9/29/94	*Amended* Certificate of Readiness	
1/24/94	ROA (#Vols. *9* :p *4* T *5*)	

* * *

1/24/94	Exhibits (Itemize) *(1 acc. fldr w/DE#116 & 136)*	
9/29/94	Exhibits (Itemize) *(1 box of exhibits)*	

* * *

Appendix A

4. BRIEFING INFORMATION

Briefing Notice Issued *2/9/94* DUE

* * *

3/17/94 Brief for Appellant *VF* D: *3/16/94* *3/23/94*

* * *

3/17/94 Record Excerpts *VF*
5/12/94 Record Excerpts *MGLIC*

* * *

4/25/94 Brief for X-Appellant *MGLIC* D: *4/22/94* *4/23/94*
M:5/12/94

* * *

5/20/94 Brief for X-Appellee *VF* D: *5/19/94* *5/30/94*

* * *

6/7/94 Reply Brief for Appellant *MGLIC* *D:6/6/94* *6/5/94*

* * *

3/8/95 Supp. Authority — Ape *XX*

* * *

Appendix A

6. OTHER MOTIONS & ORDERS

3/17/94	*FLG. Appellant's Suggestion For En Banc Initial Hearing Pursuant To Rule 35 of The Federal Rules of Appellate Procedure.jwf*
10/12/94	*FLG. ORDER: No Judge in regular service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate procedure; Eleventh Circuit Rule 35-5), the Suggestion of Hearing En Banc is DENIED. (ERC) (j)jwf*

APPENDIX B — JUDGMENT OF THE COURT OF APPEALS FILED JUNE 7, 1995

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-5187

District Court No. 90-06530 CIV

VINCENT FIORETTI,

Plaintiff-Counter-Defendant-
Appellant-Cross-Appellee,

versus

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY,

Defendant-Counter-Claimant-
Appellee-Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

JUDGMENT

Before KRAVITCH and EDMONDSON, Circuit Judges, and EISELE*, Senior District Judge.

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* Honorable Garnett Thomas Eisele, Senior U.S. District Judge for the District of Arkansas, sitting by designation.

Appendix B

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-counter-defendant-appellant-cross-appellee pay to defendant-counter-claimant-appellee-cross-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 7, 1995
For the Court: Miguel J. Cortez, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 8/4/95

APPENDIX C — EXCERPT FROM THE PETITION FOR A REHEARING DATED JUNE 23, 1995

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Rehearing of the Court's Opinion of June 7, 1995, was mailed this 23 day of June, 1995, to Mark F. Hughes, Jr., Esq., ROBINSON ST. JOHN & WAYNE, Two Penn Plaza East, Newark, NJ 07105-2249; John W. Thornton, Esq., THORNTON & MASTRUCCI, P.A., Suite 720 Biscayne Building, 19 West Flagler Street, Miami, FL 33130-4478.

COONEY WARD LESHER & DAMON, P.A.

1555 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
(407) 689-8111

s/ Gerald S. Lesher
Gerald S. Lesher
Florida Bar No. 284491

and

Steve Fine, Esq.
4901 N. W. 17th Way
Suite 406
Fort Lauderdale, Florida 33309

ATTORNEYS FOR APPELLANT

APPENDIX D — POINT HEADINGS OF THE FIORETTI BRIEF IN THE ELEVENTH CIRCUIT

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V	Statement of Issues Presented for Review and Scope of Review	7
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VIII	Argument	19-40
	(A) THE INCONTESTABILITY CLAUSE BARS ALL DEFENSES EXCEPT NON-PAYMENT OF PREMIUM.	**19-26**
	(B) THE *MASLIN* LINE OF CASES ARE NOT APPLICABLE TO THE FACTS IN THIS CASE.	**26-31**

Appendix D

(C) THE LAW IN FLORIDA, NEW YORK, AND NEW JERSEY PROHIBITS MASS GENERAL'S CHALLENGES WHICH ARE NOT BASED ON NONPAYMENT OF PREMIUMS OR IN THE CASE OF NEW YORK AND NEW JERSEY SPECIFICALLY STATED IN THE POLICY. **31-39**

(D) THIS CASE CANNOT BE RESOLVED BY LOOKING ONLY TO WHERE THE LAST ACT OCCURRED. **39-47**

(E) THE PLAINTIFF SHOULD HAVE BEEN PERMITTED TO AMEND HIS COMPLAINT TO PROVE HIS ENTITLEMENT TO PUNITIVE DAMAGES. **47-49**

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